Supreme Court, U.S.
FILED

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No. _____

In the Supreme Court of the United States

DENNIS L. COLWELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the statute of limitations in 28 U.S.C. §2244 (d) is equitably tolled when Petitioner's counsel miscalculates the filing deadline date of the petition for Habeas Corpus.

II. Whether the statute of limitations in 28 U.S.C. §2244 (d) is statutorily tolled, when a pro se Petitioner is legally blind and there are no handicap aids for the blind in the prison law library, for filing a petition for Habeas Corpus.

III. Whether the statute of limitations for filing a petition for Habeas Corpus under 28 U.S.C. §2244 *et seq.* is equitably tolled when the factors of: a) Petitioner's counsel miscalculating his filing deadline date; b) Petitioner is legally blind, without visually-impaired access to the prison law library; and c) constitutional violations in Petitioner's underlying case, are considered in their totality.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The Petitioner is Dennis L. Colwell. He has no corporate affiliations.

The Respondent is the United States of America.

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Petitioner, Dennis L. Colwell respectfully prays that a writ of certiorari be issued to review the judgment of the Untied States Court of Appeals for the Sixth Circuit, entered on October 9, 2003.

OPINIONS BELOW

On October 9, 2003, the Untied States Court of Appeals filed an Opinion, not recommended for full-text publication, affirming the dismissal of Petitioner's petition for writ of habeas corpus. (Appendix B). The same court then denied Petitioner's petition for a panel rehearing due to a material mis-quote of Petitioner's counsel at the oral argument by the 6th Circuit Panel.

JURISDICTION

Petitioner seeks review of the judgment of the United States Court of Appeals entered on October 9, 2003, affirming the district court's dismissal of his petition for writ of habeas corpus. The ninety day time period for seeking review of the judgment to this Court commenced to run on October 29, 2003, the day the court of appeals opinion and order was issued denying Petitioner's request for a panel rehearing of his case. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution:

No person shall be . . . deprived of life, liberty, or property, without due process of law.

Fourteenth Amendment to the United States Constitution:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . .

28 U.S.C. §2244(d) of the Anti-terrorism and Effective Death Penalty Act [AEDPA]:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.

STATEMENT OF THE CASE

Petitioner plead guilty and was convicted on December 1, 1995, in the Licking County, Ohio, Common Pleas Court of various sex crimes. A motion to withdraw his guilty plea was filed in the same court on April 4, 1996, and was subsequently denied. Appellant then filed a notice of appeal on May 14, 1996, from the denial of his motion to withdraw his guilty plea. His appeal was concluded on December 9, 1996. Prior to December 9, 1996 date, Petitioner filed a state post-conviction petition on June 28, 1996, citing grounds of ineffective assistance of trial counsel. The petition for post-conviction relief was denied on August 24, 1996. An appeal of the decision denying the post-conviction relief motion was filed on September 6, 1996. The Ohio appellate court issued its decision denying post-conviction relief on March 27, 1997. Forty-five days after the appellate court filed its decision, a notice of appeal was filed with the Ohio Supreme Court on May 5, 1997. On July 31, 1997 the Ohio Supreme Court filed its order denying further review. With

an additional 90 days to file a petition for writ of certiorari to this Court, Mr. Colwell's case did not become final until October 30, 1997. Petitioner hired prior counsel to review his case for a habeas filing. However, that prior counsel miscalculated the statute and told Mr. Colwell in a letter, dated April 24, 1998, that his time for filing in federal court had passed.

On December 28, 2000, Appellant filed his petition for habeas corpus relief with the U.S. District Court, Southern District of Ohio, Eastern Division. Respondent, Attorney General for the State of Ohio filed a Motion to Dismiss on January 24, 2001. Petitioner filed a Memorandum Contra to Respondent's Motion to dismiss on March 15, 2001. The Magistrate-Judge granted Respondent's motion on July 23, 2001, from which Petitioner filed an objection to that report on August 20, 2001. The district court Judge adopted and affirmed the Magistrate-Judge's Report and Recommendation, dismissing Appellant's petition, on September 4, 2001. Thereafter, this timely appeal was filed on September 4, 2001, with the Sixth Circuit Court of Appeals. The district court issued an Opinion and Order on February 3, 2002, granting Petitioner a Certificate of Appealability on the following issue:

> Did petitioner fail to comply with the one year statute of limitations under 28 U.S.C. §2244(d)?

The Sixth Circuit issued its Opinion and Judgment affirming the district court's ruling on October 9, 2003. There were factual errors regarding statements made by Petitioner's counsel during oral argument that materially affected the appellate court's decision; namely, that Petitioner's counsel allowed the one year statute of limitations to pass. Moreover,

the appellate court failed to address the third tier of Petitioner's third argument, namely:

> The statute of limitations for filing a petition for Habeas Corpus under 28 U.S.C. §2244 *et seq.* is equitably tolled when the factors of:
>
> a) Petitioner's counsel miscalculating his filing deadline date; b) Petitioner is legally blind, without visually-impaired access to the prison library; and **c) constitutional violations in Petitioner's underlying case which constitute a manifest miscarriage of justice, are considered in their totality**. (Emphasis Added).

A petition for panel re-hearing was filed on October 23, 2003. The court of appeals denied Petitioner's request in a one sentence opinion dated October 31, 2003. Thereafter, this timely petition for writ of certiorari was filed.

ARGUMENT

INTRODUCTION:

The Sixth Circuit Court of Appeals has made a grievous error. It has denied a blind man, a veteran of the U.S. Armed Services and a law abiding citizen until his early fifties, equitable and statutory tolling of his 1-year statute of limitations to file a petition for habeas corpus, under ADEPA. Petitioner was not only legally blind and unable to read, but he had an attorney who miscalculated his ADEPA statute of limitations and based upon that advice Petitioner failed to file his petition within the 1-year limitations period. There is a federal court in Texas that has held a lawyer's incorrect advise to his or her client regarding the statute of limitations

in ADEPA is grounds to equitably toll the one year statute of limitations. Also, Petitioner had no way to discover his prior counsel's error as there was no handicapped access to the law library at his prison. The court of appeals ruled that such access is not constitutionally required, in opposition to other Circuit Courts in the United States. Finally, the court of appeals ignored an issue before it and materially mis-stated Petitioner's counsel at oral argument to the detriment of Petitioner.

The Sixth Circuit has therefore grossly departed from the usual course of judicial proceedings and has sanctioned an error by the Southern District Court of Ohio, Eastern Division, that is so horrendous this Court's supervisory power must be invoked.

ADEPA:

A state prisoner has one year after his case becomes final to file a 28 U.S.C. §2254 petition for federal habeas corpus under 28 U.S.C. §2244(d) of the Anti-terrorism and Effective Death Penalty Act [AEDPA]. This statute of limitations is subject to tolling, however. Petitioner's case become final on August 25, 1997.

Petitioner's former lawyer in April of 1998 miscalculated the AEDPA deadline and told Petitioner the statute of limitations had passed, when in fact four months remained to file the petition for habeas corpus.

EQUITABLE TOLLING:

In Calderon v. United States, 128 F.3d 1283. (9th Cir. 1997) the court of appeals held that the AEDPA's 1-year filing deadline is a statute of limitation, subject to equitable

tolling, not a jurisdictional bar. Most importantly, the Calderon court held that the time bar of 28 U.S.C. §2244(d)(1) can be tolled "if 'extraordinary circumstances' beyond a prisoner's control make it impossible to file a petition on time." Id at 1288-89 (citing *Alvarez-Machain v. United States*, 107 F.3d 696, 701 (9th Cir.1997)). This conclusion was adopted by the District Courts in the Sixth Circuit.

The District Court for the Eastern District of Michigan, Southern Division in Washington v. Elo, 2000 U.S. Dist. LEXIS 4432, summarized that:

> . . . the doctrine of equitable tolling preserves a plaintiff's claims when strict application of the statute of limitations would be inequitable. Equitable tolling stops the running of the statute of limitations in light of established equitable considerations. [In the case of procedural default] a federal court may nonetheless entertain the habeas petition if the petitioner makes a showing that constitutional error probably resulted in the conviction of an actually innocent person. Id. at 23 (*citing Davis v. Johnson, 158 F.3d 806 (5th Cir. 1998), 810; New Castle County v. Halliburton Nus Corp., 111F.3d 1116, 1125 (3rd Cir. 1997); and Murray v. Carrier, 477 U.S. 478, 496, 91 L.Ed. 2d 397, 106 S.Ct.2639 (1986); (citations omitted)).* Therefore, a claim of probable actual innocence supported by credible evidence may provide a basis for equitable tolling of the statute of limitations. Id. at 23.

The Court for the Southern District of Ohio, Western Division in Warren v. United States, 71 F. Supp.2d 820, 822, has also addressed the issue of equitable tolling.

> This Court . . . finds that the AEDPA's one-year limitation period is subject to the doctrine of equitable tolling. . .
>
> [E]quitable tolling does not lend itself to bright-line rules, but draws on general principles to guide when equitable tolling is appropriate. We must be cautious not to apply the statute of limitations too harshly. Dismissal of a first habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty. (*Citing Fisher v. Johnson, 174 F.3d 710 (5th Cir. 1995)).*

In a letter from his former counsel dated April 24, 1998, Mr. Colwell was told that the statute of limitations had passed for filing a federal habeas corpus petition. This advice was obviously wrong. (This letter was read to him by his mother, Alice Kovach).

A federal district court in Texas has stated the statute of limitations is equitably tolled, when ineffective assistance of counsel is the cause of untimely filing. Henderson v. Johnson, 1 F. Supp.2d 650 (N.D. Tex., 1998). In establishing a non-exclusive list of eight factors to guide other courts in deciding when equitable tolling is meritorious, the Henderson court opined:

> Although not all factors will apply in a given case, other considerations may appropriately be considered, and each factor need not carry equal weight. These considerations will enable the court to address the tolling issue using a framework that clarifies the more abstract aspects of the general rule. . . #(6) if the

> prisoner was represented by counsel in the federal habeas process, whether counsel rendered ineffective assistance that was both constitutionally deficient and actually prejudiced the prisoner's filing of a timely petition; . . . Id. at 654.

Missing a critical statute of limitations is constitutionally deficient and actually prejudiced Mr. Colwell's timely filing of his petition.

STATUTORY TOLLING:

The provisions for statutory tolling are found in 28 U.S.C. §2244 (d)(1):

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of–
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> >
> > (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made

retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Sections (B) and (D) apply to Mr. Colwell's case.

Mr. Colwell can neither read text books nor the fine print on habeas corpus petition forms. The State of Ohio was aware of Petitioner's blindness, through its own doctors in the prison system. Mr. Colwell did not have access to any materials or services that would have enabled him to file a *pro se* petition. The State of Ohio prevented him from filing his petition on time because it did not provide visually handicapped access to the law library or to necessary legal forms at the prison. A request by this counsel for verification of the absence of these aids was denied by prison officials.

The prison's lack of visually impaired access to its law library violated Mr. Colwell's right to do process. It prevented him from filing his habeas corpus petition on time, thus denying him meaningful access to the courts. Therefore, Dennis' did not fail to comply with the one year statute of limitations under 28 U.S.C. §2244(d). Lewis v. Casey, 518 U.S. 343, at 350, 116 S.Ct. 2174 (1996), and Bounds v. Smith, 430 U.S. 817, at 823, 97 S.Ct. 1491 (1977).

Prior counsel incorrectly calculated Petitioner's statute of limitations under the ADEPA. This occurred before the statute ran. That prior counsel then stopped representing Mr. Colwell. Again, this happened before the statute ran out. Petitioner was then made a *pro se litigant*. Unfortunately, he was unable to hire present counsel until after his statute of limitations would have expired without further tolling. Current counsel took over Mr. Colwell's case in the Summer of 1999. At first it appeared that Petitioner had missed his filing deadline. Then, the letter from prior counsel was discovered in January, 2000. The absence of visually impaired access to the law library was verified in the Summer of 2000. Therefore, the tolling of the statute would have ended at the earliest in January of 2000. Petitioner filed his petition for writ of habeas corpus in December of 2000.

TOTALITY OF THE CIRCUMSTANCES:

Mr. Colwell's blindness, his prior attorney's advice and the violation of his constitutional rights presents extraordinary circumstances beyond his control. These extraordinary circumstances prevented Petitioner from filing his petition for habeas corpus, or of learning that his previous lawyer's advice was wrong.

The court in Henderson v. Johnson, *supra,* urged the balancing of whether the petitioner's *circumstances were extraordinary*, when measured according to those encountered by a *typical prisoner*, who prosecutes *pro se* a federal habeas petition. Henderson v. Johnson, *supra,* at 654. The Henderson court also advocated a determination of whether petitioner's *circumstances were beyond his control,* when measured according to the *degree of control available to a typical prisoner* who prosecutes a *pro se* federal habeas petition. Id.

Equitable tolling can prevent a fundamental miscarriage of justice, due to ineffective assistance of counsel. If given the opportunity, petitioner will show that his trial counsel was prejudicially ineffective as contemplated in Strickland v. Washington, 466 U.S.668, 104 S.Ct. 2052 (1984), and that ineffectiveness lead to the conviction of a man innocent of rape and attempted rape.

Under special circumstances, the federal courts allow §2254 petitions to be heard that are otherwise subject to dismissal. For example, a habeas corpus petition can be dismissed for procedural default. Procedural default occurs when a claim could have been raised at the state level, but was not, and is being raised for the first time in federal court. If such a petitioner can show the cause for the default (a cause beyond his control) and the prejudice that will result from the dismissal of the habeas petition (exhausted remedies in state courts), then the federal court will hear the matter, despite the procedural default. Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977).

This Court in Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639, 2645, 2649, 2650, (1986) stated that there are even times when a petitioner does not have to show a cause for his procedural default.

> In appropriate cases, the principles of comity and finality that inform the concepts of cause and prejudice "must yield to the imperative of correcting a fundamentally unjust incarceration" . . . Accordingly, we think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of

> a showing of cause for the procedural default. Id. at 2649 (other citations omitted).

The Strickland Court observed that fundamental fairness is the central concern of the writ of habeas corpus. Strickland v. Washington, 466 U.S. at 697.

Petitioner's trial counsel was constitutionally ineffective, because he failed to obtain and verify any of the alleged evidence against Mr. Colwell. Petitioner's counsel was ineffective for failing to inform him of his right to remain silent and for encouraging Mr. Colwell to tell the police detectives what they wanted to hear. As a result of trial counsel's failures, Petitioner was wrongfully conviction for rape and attempted rape. The AEDPA's statute should be tolled to allow a fair and independent review, by the district court, when it appears that one who is actually innocent will remain incarcerated, if such review is not granted.

Unfortunately, the court of appeals ignored this portion of Petitioner's appellate brief and when it was requested to be addressed in a petition for re-hearing, it was again ignored.

SIXTH CIRCUIT MAKES FACTUAL ERROR AND WILL NOT CORRECT IT:

On Appendix page 10a the Sixth Circuit in its Opinion wrote: . . . Colwell's habeas counsel conceded that he was aware of the limitations period, but chose the path of filing the petition late in order to develop the further legal theories he offered to the court." (Appendix pg. 10a). This statement by the court of appeals is factually incorrect. The court of appeal's statement further implies that counsel believed there was some time left on the one year statute of limitations, under 28 U.S.C. §2244, when he took over the case, and

decided to let that time period pass, in order to develop his client's grounds for habeas relief.

The court of appeals compared the case at bar to that of Jurado v.Burt, 337 F.3d 538 (6th Cir. 2003), stating that counsel in that case was aware of the statute of limitations, but "chose not to rush" to scour the record for constitutional violations. (Appendix pg. 10a). Mr. Colwell's case is factually distinguishable on two important points. First, counsel in Jurado allowed the statute to pass while she looked for issues for a state post conviction petition. She delayed the filing of the state post-conviction and in so doing she allowed the statute for filing a federal habeas petition to pass. Second, counsel in Jurado admitted in an affidavit that she intentionally allowed the federal habeas statute to run. Counsel for Mr. Colwell did neither of these things charged to counsel in Jurado.

In reviewing the Andrews v. Orr, 851 F.2d 146 (6th Cir. 1988) standard for equitable tolling (failure to file timely unavoidably arose from circumstances beyond litigants control) the court of appeals recounted the acts of the counsel in Jurado:

> In this case, the first two factors – petitioner's lack of notice and lack of constructive knowledge of the filing requirement – weigh against equitable tolling of the limitations period. Jurado stated in his brief that he "had to choose between prematurely filling a petition for post-conviction relief in state court that was not adequately support by the facts, or waiting to file until all facts had been reasonably investigated and evaluated, even if the grace period under ADEPA expired." At the time, his counsel "believed it was more important to develop Petitioner's cased in accord

> with standards of professional conduct" than it was to comply with ADEPA'S statute of limitations, according to his brief. Thus, Jurado does not contend that he or his counsel was unaware of ADEPA's one-year limitations period. Rather, they made a tactical decision to continue investigating claims for his state post-conviction relief application although they were aware that his time in which to file for habeas relief would expire. (Appendix 10a).

Prior to January of 2000 counsel did not believe that he had time left on the statute of limitations in this matter that he could prove. It is important to note that Petitioner is arguing that the statute was tolled for the entire period prior to January 2000 (explained more fully below). Moreover, counsel could not have filed the petition without a meritorious cause of action, or with a conjoining reason to toll the statute of limitations. At the time counsel first began to review this case, he had no reason to believe that there was any way to save the statute of limitations by equitable tolling, short of proof of actual innocence (which was obtained by way of affidavit in October of 2000, from Mr. Colwell's trial counsel- showing that he allowed Petitioner to admit to and plead to crimes he did not commit) and/or the discovery of some other factor that would have prevented him from filing in a timely manner.

Current counsel did not concede at oral argument that he purposely allowed the statute of limitations to run, as suggested by the court of appeals. Petitioner's counsel attempted to argue that the statute would have tolled in late August, 1997 (but with the court of appeals' calculation, the state case became final on July 31, 1997), because Petitioner was blind and could not use the library. It would have also remained tolled during the employ of Attorney Barry Wilford,

as Wilford gave Appellant erroneous advice as to the filing deadline. Thereafter, the statute would have continued to remain tolled until such time as current counsel discovered the letter from Wilford in January of 2000.

SPECIFIC STATEMENTS AT ORAL ARGUMENT:

This counsel sated at Appendix pages 20a and 21a, of the oral argument transcript (taken from the audio tape of the oral argument) that when he first agreed to review the case he believed the one year statute of limitations had passed.

Petitioner's argument is discernable from his briefs oral argument is as follows: (1) When this counsel received Defendant's case, it was determined that the one year statute of limitations under the Anti-terrorism and Effective Death Penalty Act [ADEPA] had passed. (2) It was further determined that the only way to defeat the statute of limitations was to find evidence of actual innocence, a state impediment that prevented timely filing, or some other equitable cause for failure to file. (3) Although counsel was aware of Mr. Colwell's blindness when he took the case, it was not readily apparent as to how his blindness prevented his filing, as he had had access to counsel through his family in the past. (4) As counsel went through the substantial file in this case, it became clear that Petitioner had an actual innocence claim, due to his trial lawyer encouraging him to admit to crimes he did not commit. However, evidence beyond Petitioner's affidavit had to be obtained to show that the factual predicate actually existed, which would satisfy paragraph (d)(1)(D) of the statute. This evidence would also give rise to equitable tolling under federal case law on actual innocence/ manifest injustice grounds. (Please see Murray v. Carrier, *infra*). (5) As soon as the possibility of proving actual innocence arose, this counsel exercised due diligence

and actively pursued trial counsel to have him execute an affidavit regarding his failures. That process took almost a year in trying to convince trial counsel to come forward and confess his errors. **(6)** During that pursuit, the letter from prior counsel - Barry Wilford - came to the attention of counsel. The letter evidenced actual prejudice caused to Appellant by his blindness, as he did not have the ability to check the opinion of prior counsel. So in review, when first taking the case, this counsel did not believe that he had a chance to file without some proof of how the blindness prevented the filing, if prior counsel was available. But the letter combined with Mr. Colwell's blindness, failing health and inability to organize his papers prevented him from timely filing or communicating the contents of that letter to this counsel. Therefore, the statute would be equitably tolled until January, 2000.

Counsel did not argue that there was a limited amount of time left on the initial statute of limitations when he first took the case, as the court of appeals would suggest. Counsel argues that in January of 2000, the discovery of the Wilford letter revealed that the entire period of limitation was preserved. It showed that the statute was equitably and statutorily tolled by the Petitioner's blindness, that it was equitably tolled by prior counsel's advise, and as there was a manifest miscarriage of justice that could not be proved until the obtaining of trial counsel's affidavit.

The above argument was unfortunately misapprehended by the appellate court, as counsel tried to answer its questions regarding the presence, availability and application of both statutory and equitable tolling. This confusion was seen at Appendix page 3c, where the court of appeals asked counsel if it would not have been better to go ahead and file the petition, before he had evidence of actual innocence. This

counsel tried to explain that in order to have any case at all, there needed to be independent proof of actual innocence, via ineffective assistance of trial counsel to prevail on the merits. Without said proof, a petition could not have been filed. So, in concert with the merits argument is the fact that until the evidence of actual innocence was obtain, there would be no evidence to support the equitable tolling argument via case law or paragraph (d)(1)(D) of 28 U.S.C. §2244. Petitioner's counsel stated:

> That's why we didn't file the petition after we found the initial letter saying that his time period had passed, because we knew we had a high hurdle, so instead of initially filing it and then . . . praying on the graces of the district court to grant us an opportunity to amend and add issues we wanted to make sure we had all the bases covered before we filed. And those bases were that he got bad advise, that he wasn't -- he didn't have access to the law library . . . And, then, we had to get confirmation and admission from that trial lawyer to say "Well, yeah, . . . he told me what happened and he didn't rape these people . . ." (Appendix pg.16a).

At Appendix page 16a the court of appeals asked, "Are you arguing that we should grant equitable tolling when lawyers need more time to develop a case?" To which counsel answered "No." This answer supports the conclusion that this case is not at all like that of Jurado, *supra*. Equitable tolling should be granted on a case by case basis, under the analysis in Andrews, and is not limited to a one year time period.

Mr. Colwell's case was final on October 30, 1997. The one year statute did not begin to run, because Petitioner could not read and was unable to do the research for himself. Then

he hired former counsel in 1998. However, the statute should not start to run again because that counsel was ineffective. Thereafter, the statute would continue to be tolled, even after the hiring of this counsel, because, Petitioner's blindness prevented him from learning of the prior counsel's mistake, and it equally prevented him from delivering the letter evidencing the same to this counsel until January of 2000. Therefore, the statute should have been tolled until January of 2000, when this counsel discovered the letter. As such, the statutory tolling provisions of 28 U.S.C. §2244(d)(1)(D) and equitable tolling work in tandem with each other. This application of the two approaches to toll the ADEPA statute is not prohibited by the Andrews standard, nor is it excluded ~~in~~ the legislative history or notes of the ADEPA statute.

As explained above this Court in Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639, 2645, 2649, 2650, (1986) stated that there are times when a petitioner does not have to show a cause for his procedural default.

> In appropriate cases, the principles of comity and finality that inform the concepts of cause and prejudice "must yield to the imperative of correcting a fundamentally unjust incarceration" . . . Accordingly, we think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default. Id. at 2649 (other citations omitted).

Therefore, as counsel did not admit to allowing the statute to run, and as the statute did not run, based on the above analysis, the Sixth Circuit Court of Appeals was both factually and legally incorrect in its Opinion affirming the district

court's dismissal of Petitioner's petition for a writ of habeas corpus, without hearing the case on its merits.

CONCLUSION

Counsel for Petitioner did not allow the statute of limitations in this case to pass. Equally, there was no strategy to allow the statute to pass. The statute of limitations was tolled either until current counsel discovered prior counsel's ill advised letter, or until counsel was able to obtain the affidavit of trial counsel. As such the statute did not begin to run, at its earliest until January of 2000. Mr. Colwell filed his petition for writ of habeas corpus in December of 2000. Therefore, he was timely in his filing and the lower courts were in error to hold otherwise. The court of appeals analysis contradicts that of the court in Henderson v. Johnson, *supra*, and of this Court in Lewis v. Casey and Bounds v. Smith, *supra*, which would toll the statute of limitations both for ineffective assistance of counsel and for lack of handicapped access to the prison law library, respectively.

Petitioner was denied his right of due process under the 14th Amendment at the state court levels, and is being imprisoned for crimes he did not commit. He petitioned the federal courts to remedy this injustice and was turned away without a hearing of his case on its merits. Petitioner now

prays that this Honorable Court will grant his petition for writ of certiorari so that this injustice may be cured.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 01-4032

[Filed October 31, 2003]

DENNIS L. COLWELL, Petitioner-Appellant,	)
v.	)
TERRY COLLINS, Warden, Respondent-Appellee.	)

On Appeal from the United States District Court
for the Southern District of Ohio
00-01475
Sargus, Jr. 09-04-01

Before: DAUGHTREY, MOORE, and SUTTON; Circuit Judges

ORDER

Upon consideration of the petition for rehearing filed by the Appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 01-4032

[Filed October 9, 2003]

DENNIS L. COLWELL, Petitioner-Appellant,	)
v.	)
TERRY COLLINS, WARDEN, Respondent-Appellee.	)

On Appeal from the United States District Court -
for the Southern District of Ohio
00-01475
Sargus, Jr. 09-04-01

Before: DAUGHTREY, MOORE, and SUTTON, Circuit Judges.

OPINION

KAREN NELSON MOORE, Circuit Judge.

Petitioner-Appellant Dennis L. Colwell ("Colwell") filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Ohio on December 28, 2000, after the expiration of the one-year statute of limitations period mandated by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). 28 U.S.C. § 2244(d). The district court accordingly dismissed the petition as untimely. Colwell appeals and claims that the district court should have tolled the one-year limitations period on equitable and/or statutory grounds because Colwell's prior attorney incorrectly informed Colwell that the limitations period had already run, and because Colwell's limited eyesight prevented him from discovering the attorney's mistake and filing a petition in a timely fashion. Because neither equitable tolling nor statutory tolling are appropriate here and because Colwell's petition would still be untimely even if they were, we **AFFIRM** the district court's dismissal of the petition for a writ of habeas corpus.

I.

Colwell pleaded guilty on December 1, 1995, to two counts of rape, two counts of gross sexual imposition, and one count of attempted rape, and was sentenced to fifteen to twenty-five years of imprisonment by the Court of Common Pleas of Licking County, Ohio. Following the imposition of the sentence, Colwell filed a motion on April 4, 1996, in the same trial court to withdraw his guilty plea and to receive a new trial. The trial court denied his motion via judgment entry dated April 18, 1996. He appealed on May 14, 1996, to the Fifth District Court of Appeals, which affirmed the trial

court on December 9, 1996. *State v. Colwell*, 1996 Ohio App. LEXIS 6121, No. 96-CA-65, 1996 WL 753167 (Ohio App. 5th Dist. Dec. 9, 1996). Colwell did not further appeal this decision to the Ohio Supreme Court.

On June 28, 1996, Colwell filed a collateral petition for post-conviction relief on the grounds of ineffective assistance of trial counsel in the Court of Common Pleas of Licking County. On August 13, 1996, the trial court denied this petition. On September 6, 1996, Colwell appealed to the Fifth District Court of Appeals, which affirmed the decision of the trial court on March 27, 1997. *State v. Colwell*, 1997 Ohio App. LEXIS 1934, No. 96-CA-114, 1997 WL 219120 (Ohio App. 5th Dist. Mar. 27, 1997). On May 12, 1997, Colwell appealed to the Ohio Supreme Court, which declined jurisdiction over the appeal on July 31, 1997. *State v. Colwell*, 79 Ohio St. 3d 1460, 681 N.E.2d 442 (1997). Thus, Colwell's direct and collateral appeals terminated on July 31, 1997.

In late 1997 or early 1998, Colwell contacted the law firm of Kura & Wilford to inquire into methods of securing his release from prison. On April 24, 1998, attorney Wilford sent Colwell a letter and a report, which concluded that even though "all of your issues ... would, in years past, have presented ripe fruit for a federal *habeas corpus* filing[,] ... because of the one-year time limitation ... it is too late to litigate this issue in federal court." Joint Appendix ("J.A.") at 65 (Wilford Letter). This guidance turned out to be incorrect; in April 1998, Colwell had more than three months left to petition the federal district court for a writ of habeas corpus.

Of particular additional relevance is Colwell's severe eyesight problem. The Ohio Department of Rehabilitation and

Corrections considers Colwell to be legally blind, and although Colwell does not completely lack the ability to see, he has extreme difficulty reading and his deteriorating eyesight causes him pain. Colwell alleges that his eyesight prevented him from reading books, statutes, or forms that would have allowed him to double-check Wilford's work and uncover the error. He also claims that the prison library did not have any Braille or other services to assist the blind in conducting legal research. However, Colwell did rely on outside assistance for reading in the past, as Colwell's mother read him Wilford's letter when it arrived.

Colwell hired present counsel at some point in the summer of 1999. Colwell contends that his present counsel did not discover the letter from Wilford until January 2000, which delayed the filing of his habeas petition until December 29, 2000, nearly three-and-a-half years after the conclusion of his collateral state appeal. The district court rejected Colwell's petition as untimely and did not believe that equitable tolling applied. Colwell filed a notice of appeal, which the district court "construed as a request for a certificate of appealability." J.A. at 20 (Dist. Ct. Op. & Order). The district court granted a certificate of appealability ("COA"), because it concluded that "jurists of reason would find it debatable whether the Court was correct in its ruling that equitable tolling should not apply and that the petition was barred by the statute of limitations." J.A. at 25 (COA) (citing *Slack v. McDaniel*, 529 U.S. 473, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)). The district court had proper jurisdiction under 28 U.S.C. § 2254(a), and we have jurisdiction to hear an appeal on the issue raised by the COA under 28 U.S.C. § 2253(c).

II.

Generally, we review *de novo* a district court's decision to deny a writ of habeas corpus. *Northrop v. Trippett*, 265 F.3d 372, 376 (6th Cir. 2001). A district court's factual findings are not disturbed unless they are clearly erroneous. *Sawyer v. Hofbauer*, 299 F.3d 605, 608 (6th Cir. 2002). We review *de novo* a district court's decision not to apply the doctrine of equitable tolling when the facts are undisputed or when equitable tolling is unavailable as a matter of law. *Dunlap v. United States*, 250 F.3d 1001, 1007, 1008 & n.2 (6th Cir. 2001) . Because the relevant facts are undisputed here, *de novo* review is the proper standard.

Congress placed a one-year statute of limitations on habeas petitions brought by state prisoners under AEDPA. 28 U.S.C. § 2244(d)(1) ("A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court."). The statute of limitations commences in this case on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). The statute of limitations can be equitably or statutorily tolled, *Griffin v. Rogers*, 308 F.3d 647, 651 (6th Cir. 2002), but tolling does not expand the limitations period beyond its statutorily mandated boundaries; it merely stops the clock from running during the tolling period.

The parties dispute the date when the limitations period started, and consequently also the date when the limitations period ran. Colwell's appeal from the denial of his motion to withdraw the guilty plea is part of his underlying criminal case, and under 28 U.S.C. § 2244(d)(1)(A), the limitations period does not begin to run until the direct review period

ends.[1] Because the Ohio court of appeals did not reject Colwell's direct appeal of this motion until December 9, 1996, the one-year limitations period did not commence until that date. The clock then would have started, but Colwell had already filed a post-conviction motion on June 28, 1996, which tolled the statute of limitations the moment it started to run. *See* 28 U.S.C. § 2244 (d)(2) ("The time during which a properly filed application for State post-conviction or other collateral review ... is pending shall not be counted toward any period of limitation ...."). Additionally, the days in between the appellate court's affirmance of the trial court's denial of the post-conviction motion and the subsequent appeal to the Ohio Supreme Court are tolled, such that the clock would not run during the preparation periods between appeals. *See Carey v. Saffold*, 536 U.S. 214, 219-20, 122 S. Ct. 2134, 153 L. Ed. 2d 260 (2002). Upon the Ohio Supreme Court's decision to decline jurisdiction over Colwell's appeal on July 31, 1997, the statute of limitations again began to run. It expired on July 31, 1998.[2] Colwell did not file his petition

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[1] The Ohio Supreme Court has held that a postsentence motion to withdraw a guilty plea filed in the trial court, which is governed by Ohio Criminal Rule 32.1, "is not collateral but is filed in the underlying criminal case," and accordingly "it is not a 'collateral challenge to the validity of a *conviction or sentence.*'" *State v. Bush*, 96 Ohio St. 3d 235, 2002 Ohio 3993, 773 N.E.2d 522, 526 (Ohio 2002) (quotation omitted). The appeal of the denial of such a motion is thus part of the direct review process.

[2] Colwell, however, counters that the limitations period was again tolled during the ninety days he had to file a petition for a writ of certiorari with the U.S. Supreme Court. Under *Isham v. Randle*, 226 F.3d 691, 695 (6th Cir. 2000), the ninety-day period in which Colwell could have petitioned the U.S. Supreme Court does not further toll the running of the limitations period. Currently, *Abela v. Martin,* No. 00-2430, is pending before the en

until more than two years later, on December 29, 2000. Thus, unless some other form of tolling occurred, Colwell's habeas petition was untimely.

Colwell alleges that two different types of tolling apply -- equitable tolling and statutory tolling. We conclude, however, that even if we were to toll the statute of limitations under either type of tolling, Colwell still filed his petition in an untimely fashion. Colwell argues that the ineffective assistance of his previous attorney, whose misinformation deceived Colwell about the remaining time in which he could file a habeas petition, justifies equitable tolling of the limitations period, but even if Colwell's reliance upon his previous attorney's letter could suspend the running of the habeas filing clock, his petition was still untimely. If we equitably tolled the limitations period because Wilford's letter misled Colwell into believing that he had no opportunity to file a habeas petition, the clock would stop on April 24, 1998, when Colwell received the letter. At that point, 266 days would have lapsed on the limitations period, which began running on July 31, 1997, leaving Colwell with ninety-nine days to file his habeas petition. However, once Colwell hired a new attorney in the summer of 1999, the conditions that served to justify equitably tolling the statute of limitations would have no longer existed, and the clock would have begun again to run. Even giving Colwell the benefit of the doubt and assuming that he hired his new counsel on the last day of summer, September 20, 1999, the one-year statute of limitations would have expired on December 28, 1999. And,

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banc court. In *Abela,* we are considering this very issue of whether the ninety-day period for filing a petition for certiorari should toll the limitations period. No matter the outcome in *Abela,* however, Colwell's habeas petition would still be untimely.

even if we accept Colwell's claim that his new attorney did not "discover" the letter until January 2000, Colwell still filed his habeas petition in an untimely fashion. If his new attorney discovered the letter on the last day of January 2000, Colwell needed to file his petition no later May 9, 2000. Yet, Colwell did not file his habeas petition until December 29, 2000, 234 days after May 9, the latest possible date on which the limitations period could have run.

At oral argument, Colwell's attorney contended that the limitations period should have been equitably tolled after the "discovery" of the letter while the attorney was preparing the habeas petition. As a ground for this additional equitable tolling, Colwell's attorney asserted that the late filing of the petition was a consequence of his desire to conduct as thorough as possible an investigation of Colwell's trial record. We do not find any support in the caselaw for the notion that a limitations period can be tolled under such circumstances. The court in *Jurado v. Burt*, 337 F.3d 638 (6th Cir. 2003), was faced with a similar situation in which counsel conceded that she was aware of the one-year limitations period but '"chose not to rush'" the filing of the habeas petition so as to scour the record more thoroughly for constitutional violations. *Id.* at 644. We ruled that "it was [not] reasonable to believe that a motion that was merely being investigated and drafted was 'properly filed'" such that tolling was justified. *Id.* at 645. Similarly, Colwell's habeas counsel conceded that he was aware of the limitations period, but chose the path of filing the petition late in order to develop further the legal theories he offered to the court. Such a choice was unwise. The time that counsel spends preparing a habeas petition is simply not grounds for tolling the statutorily mandated one-year limitations period; to rule otherwise would invite protracted investigations that would eviscerate the plain meaning of 28 U.S.C. § 2244(d).

Colwell's statutory tolling claim, premised on the argument that his blindness prevented him from using a prison library that lacked materials for the visually impaired, also must fail. AEDPA states that the one-year limitations period does not run when there exists an "impediment to filing an application created by State action in violation of the Constitution or laws of the United States" and the petitioner actually "was prevented from filing by such State action." 28 U.S.C. § 2244(d)(1)(B). Not only must the state impede the petitioner in some fashion, but also that obstruction must cause the untimely filing of the petition. *See Winkfield v. Bagley*, 66 Fed. Appx. 578, 2003 WL 21259699, at *4 (6th Cir. 2003) (unpublished). Colwell's chief proposition is that, had there been resources for the blind in the library, Colwell could have learned of Wilford's poor advice. Even if the lack of resources for the visually impaired could constitute an impediment, Colwell has not demonstrated that it caused him to file his petition late. The alleged impediment would no longer exist once Colwell hired new counsel who could inform him of AEDPA's limitations period; the habeas clock would again tick away, reaching zero long before Colwell's new attorney filed the petition.

III.

Because neither equitable tolling nor statutory tolling are appropriate here and because Colwell's petition would still be untimely even if they were, we **AFFIRM** the district court's dismissal of the petition for a writ of habeas corpus.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 01-4032

DENNIS L. COLWELL,
Petitioner-Appellant,

v.

TERRY COLLINS, Warden,
Respondent-Appellee.

On Appeal from the United States District Court
for the Southern District of Ohio
00-01475
Sargus, Jr. 09-04-01

ORAL ARGUMENT OF
PETITIONER-APPELLANT

July 31, 2003
Before
Hon. Martha Craig Daughtrey
Hon. Karen Nelson Moore
Hon. Jeffrey S. Sutton

ANDREW P. AVELLANO
ATTORNEY AT LAW
4181 E. MAIN STREET
COLUMBUS, OHIO 43213
(614) 237-8050

Attorney for Petitioner-Appellant
Dennis L. Colwell

JUDGE: I think you have a clock. We have a light on the other side.

MR. AVELLANO: Okay.

JUDGE: If you would like to reserve some time for rebuttal, you need to let the clerk know that at the beginning of your argument.

MR. AVELLANO: Okay. Thank you, Judge. May it please the Court and opposing counsel, Andrew Avellano -- I would like to reserve five minutes for rebuttal.

JUDGE: You may, sir.

MR. AVELLANO: Uh -- I'm here today to discuss equitable tolling and statutory tolling for habeas corpus decisions practice in federal court. The Petitioner in this case is legally blind. Uh, he's under heavy medication on a daily basis and that's what makes him unique as opposed to other petitioners who come before this Court on this issue. This Court had decided the issue of equitable tolling a number of years ago under the *Andrews v. Orr* standard.

Without going through the list of that standard step by step, I would just like to say that the lower court denied the

petition and dismissed it for failure to file timely, by saying that a lawyer's mistake is not enough to prevent a timely filing. Now, ordinarily, in a situation where a client-petitioner has the ability to read and to look at the law, that might be true. However, I think, in this case, we have a totally different situation.

JUDGE: It's your position that your client relied on the letter from the lawyer --

MR. AVELLANO: Absolutely.

JUDGE: -- saying that there was -- that -- that time had expired when it hadn't expired.

MR. AVELLANO: Absolutely. The --

JUDGE: Well, here's the problem, though, I have, Mr. Avellano. There may be some excuses that would militate in favor of equitable tolling in terms of reliance on the letter and his physical condition, and so forth, but apparently, as I gather from the record, he had a lawyer as of the summer of 1999. That the letter with bad advice come to light in January of 2000, but this petition wasn't filed until the very end of December 2000.

MR. AVELLANO: That's correct.

JUDGE: Now, that's -- that added to whatever time might have gone by in the interim not only is worrisome, but indicates that somebody wasn't diligent other than your client. But, it was -- it was almost twelve months in there, uh, more than that, if you assume that the lawyer should have done some counting, uh, himself, as early as September of '99 and figured out that -- that there was still time to file.

MR. AVELLANO: Well, based on my calculations, Judge, the time period would have run on August 25 of 1997 regarding the initial deadline. Now, the client is disabled to the extent that he's unable to really help counsel in this process. He hired my office to help him. We were retained in the summer of 1999. Now, --

JUDGE: So, you're the culprit that didn't file from January to December. I have the person right in front of me, is that correct?

MR. AVELLANO: That's correct. That's correct. You're looking at him. What happened was, the letter wasn't discovered until January of 2000. And, in discussing the case with him and realizing what we needed to bring before the court, which was the affidavit from the trial attorney, who essentially had to admit to malpractice, that was extremely difficult to obtain. And, we weren't able to obtain that until October of 2000.

JUDGE: Well, don't you think it would have been-- uh -- better to have filed -- uh -- the petition immediately and done whatever you had to do, subpoena the lawyer, whatever -- uh -- in order to -- I mean, you don't need a letter admitting malpractice if -- if the letter that -- that he got from the lawyer shows on its face that the lawyer miscalculated.

MR. AVELLANO: There is a confusion, Judge, and I'm -- I'm sorry that this is happening. But, there's a difference between the lawyer's affidavit from trial -- from the trial counsel who had him plead guilty versus the lawyers who gave him the filing deadline.

JUDGE: Right, so --

MR. AVELLANO: -- and, the affidavit that we obtained was from the trial lawyer who had him admit to things that he didn't do. And, it was our judgment that, if we were going to bring an actual innocence claim before this Court, we darn well better have proof of it before we do that. And, that's why we didn't file the petition after we found the initial letter saying that this time period had passed, because we knew we had a high hurdle. So, instead of initially filing it and then, you know, praying on the graces of the district court to grant us an opportunity to amend and add issues, we wanted to make sure we had all the bases covered before we filed. And, those bases were that he got bad advice; that he wasn't -- he didn't have that access to the law library. And, that was another sticky wicket, because the Department of Corrections and Rehabilitation for Ohio wasn't very helpful in confirming that they didn't -- that he didn't have access. And, then, we had to get confirmation and admission from that trial lawyer to say, "Well, yeah, you know, he told me what happened and he didn't rape these people; he didn't do attempted rape. But, I let him admit to it anyway."

JUDGE: Are you arguing that we should grant equitable tolling when lawyers need more time to develop a case?

MR. AVELLANO: No, no.

JUDGE: What are you arguing?

MR. AVELLANO: We're arguing that equitable tolling should be applied when, number one, you have a situation where a lawyer's mistake actually caused prejudice, which was actually failing to file a petition on time because your lawyer said, "Sorry, you're out of luck." And -- and I think, too, that we contradict ourselves if we encourage these people

to get lawyers and then we punish them for those lawyers' mistakes.

JUDGE: All right. So, the letter came to light in January of 2000. If we are going to give you equitable tolling, how long after January 2000 do we reasonably give you?

MR. AVELLANO: I believe that the statute indicates that you have one year after the discovery of the thing that prevented your initial filing.

JUDGE: No. It says you've got one year after the conviction becomes final. There's no statute that governs equitable tolling that I am aware of.

MR. AVELLANO: Well, it's -- a --

JUDGE: It's a reasonable -- isn't it the reason --

MR. AVELLANO: I misspoke, Judge. It's -- that's the second part of my brief which is statutory tolling.

JUDGE: I find it a little bit contradictory that on the one hand, when I asked you the question, "Did your client rely on the letter from the attorney --

MR. AVELLANO: Yes.

JUDGE: -- saying that the statute of limitations had passed and the attorney's wrong?" You say that your client did rely on that letter?

MR. AVELLANO: Correct.

JUDGE: And, then, somehow it's important as to when you discovered the letter? Because, if your client is relying on it, how can he get the benefit of you just finding it later on?

MR. AVELLANO: It's not contradictory under very special circumstances in this case, which is, this man's medicated daily for pain with strong doses of codeine. His mental capacity has diminished, and I have seen that diminishing over the last several years. I have been on this case since the summer of 1999, and, even prior to that, another counsel that I know, who helped him with his post-conviction petition, saw the deterioration of this man's mind. So -- and, he's a very -- he's not a very educated man. So, the point I'm trying to make is that, yes, he relied on it, but, not being educated, not having the ability to educate himself, and being medicated all the time, he wasn't able to help me that well. And, so we had to dig into the record, and then, we found out -- and then we asked him about it.

JUDGE: Can I respond to -- just a second of my thinking about it -- it can't be that equitable tolling gives you more than a year, right? Once you deal with the equities, and I see two of them here: one of them is your client's blindness and the second is, let's say, incompetence of initial counsel. In the summer of 1999 you come on board, and it seems to me you eliminate both of those inequities. You're there, you're his eyes, access to libraries; that's no longer a problem. You're there; you're competent, unlike his prior counsel. I -- I have a hard time understanding why you get more than a year from the summer of 1999 on. That seems to me to be the end of the case.

MR. AVELLANO: Well, because I don't think it would be equitable to ask a counsel who's newly hired to look at a case that is, at that point, uh --

JUDGE: But, that's contemplated by the statute which says a period of limitations for everybody: new counsel, old counsel, people who just passed the bar. It doesn't matter.

MR. AVELLANO: I -- I -- I don't disagree with that. But, I don't think that it's fair -- well, let me -- let me say this. We've made two arguments and a third, and I see that my time's up, so, uh --

JUDGE: Well, you can respond to Judge Sutton's question.

MR. AVELLANO: Okay. That we've made the equitable tolling argument, which you're correct, gives us more than a year. We've made a statutory tolling argument, which is one year from the removal of the impediment.

JUDGE SUTTON: Are you still making that argument, because the state does not respond to that in the brief? Are you still making that impediment? I -- I take it that's a Bounds argument?

MR. AVELLANO: Absolutely. That -- that he didn't have the ability to educate himself, so when I was brought on, then you could argue that your one year starts to run from that date. But, we're arguing that it doesn't run from that date to the extent that we didn't know about the letter from the lawyer.

JUDGE: Well, then, how do we excuse that, though? You came on in the summer of '99. It's your responsibility to get the record and to look through it.

MR. AVELLANO: It -- it goes back to my client's ability to organize his own papers. This is not a court document. This is a letter from a highly respected defense firm in Columbus, Ohio, that -- that told him that this statute had passed.

JUDGE: But, it hurts you as his current lawyer that you didn't know about the letter, and I understand --

MR. AVELLANO: It's -- it's -- I would -- I would have loved to have had the letter the first day I found out about it.

JUDGE: No. I'm making -- I'm making a different point. You didn't know about the letter in the summer of '99. You knew you had a year. You're new counsel. File. Why did you wait until January?

MR. AVELLANO: That's -- that's -- I respectfully descent. I don't believe it's true. When we took on the case initially, we didn't know if we had any chance of helping this man, at all. And then, when we dug further and found actual innocence arguments and the like, that's when we --

JUDGE: Okay, I think we understand that, Mr. Avellano. If you want to reserve some time for rebuttal, you may.

MR. AVELLANO: Okay.

REBUTTAL:

JUDGE: We'll hear from Mr. Avellano in brief rebuttal.

MR. AVELLANO: Thank you, Your Honor. Uh -- First of all, as I said in my brief, uh -- I don't think the messenger should shot in this matter. I have a rule eleven responsibility to not bring frivolous claims before any court, and it was my firm's decision to make sure that we had all the facts and understood this case before raising the claim. When we took the case, the statute of limitations had passed, and the developing area of case law in 1999 was not what it is today. So, there was a lot of uneven ground to look at when we took this case on. Also, it's critical to remember that there is plenty of precedent from the United States Supreme Court that says, even if there is a default, procedural or what have you, that there -- that courts can hear cases on their merits. Under *Murray v Carrier*, we have the actual innocence exception which says we don't even have to show cause for failing to bring a claim if we can show that there has been an unjust imprisonment. In this case, it took we until October of 2000 to get an affidavit from the lawyer that he had who led him down the primrose path to destruction. This man did not commit rape. This man did not commit attempted rape, and he is serving time for those crimes that he did not commit. We're asking for an opportunity to be heard, that's all. We're not asking this Court to change established law. We're asking the Court to apply the established law to the unique facts of this case so that my client can have his day in court. We've been criticized at every step of the way. We have lost at every step of the way. We have tried to be heard. We were not given hearings on the state court level to develop the record. We were not given an opportunity to file a motion to expand the record in this case because the motion to dismiss was granted. The State of Ohio should not be

allowed to stand here and say that there's no evidence on the record that there's no handicap access in this prison when they gosh darn well know that there is no such access. They cannot --

JUDGE: Well, the problem with that argument, Mr. Avellano, is that it's got to be in the record for us to be able to take note of it. That's the problem. We cannot go on what --

MR. AVELLANO: I understand that, Judge.

JUDGE: We can't go on what the state knows to be a fact that isn't in the record.

MR. AVELLANO: I understand that. We were not given the opportunity to expand the record at the district court level and, if given the opportunity, we will, and it will be shown. And, certainly I would not make a representation to any court that was not true. Again, just in conclusion, Judges, we are just asking for an opportunity to be heard.

JUDGE: All right. Thank you.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

Case No. C2-00-1475

[Filed August 30, 2001]

DENNIS L. COLWELL,
Petitioner,

v.

TERRY COLLINS, WARDEN
Respondent.

JUDGE SARGUS
MAGISTRATE JUDGE KING

OPINION AND ORDER

Petitioner, Dennis L. Colwell, a state prisoner, has pending before this Court an action for a writ of habeas corpus pursuant to the provisions of 28 U.S.C. § 2254. On July 23, 2001, the Magistrate Judge issued a *Report and Recommendation* recommending that the petition for a writ of habeas corpus be dismissed. On August 20, 2001, petitioner filed objections to that recommendation. Pursuant to 28 U.S.C. § 636(b)(1), this Court has conducted *de novo* review

of the portions of the *Report and Recommendation* objected to by petitioner. This Court would note that petitioner's objections largely restate arguments previously made to the Magistrate Judge. Upon review of the entire record before this Court, the Court hereby overrules petitioner's objections and adopts the *Report and Recommendation*.

The *Report and Recommendation* is hereby **ADOPTED AND AFFIRMED**. Respondent's motion to dismiss the petition for a writ of habeas corpus is **GRANTED**, and this case is **DISMISSED**.

/s/_____
Edmund A. Sargus, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C2-00-1475

[Filed September 4, 2001]

DENNIS L. COLWELL,	)
Petitioner,	)
	)
v.	)
	)
WARDEN COLLINS	)
Respondent.	)
	)

MAGISTRATE JUDGE KING

JUDGMENT IN A CIVIL CASE

[ ] **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[ ] **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

[X] **Decision by Court**. A decision has been rendered by the Court without a hearing or trial.

IT IS ORDERED AND ADJUDGED that pursuant to the September 4, 2001 OPINION AND ORDER the

Respondent's motion to dismiss is granted, and this case is DISMISSED.

Date: September 4, 2001

KENNETH J. MURPHY, CLERK

/s/_____
(By) Deputy Clerk
Spencer D. Harris

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

Case No. C2-00-1475

[Filed July 23, 2001]

DENNIS L. COLWELL,
Petitioner,

v.

TERRY COLLINS, WARDEN
Respondent.

JUDGE SARGUS
MAGISTRATE JUDGE KING

REPORT AND RECOMMENDATION

Petitioner, Dennis Colwell, a state prisoner, brings this action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The respondent argues that petitioner failed to file his petition in a timely manner and that, as a result, his claims are barred by the statute of limitations. Alternatively, respondent asserts that petitioner has failed to exhaust state remedies. Petitioner argues that he is entitled to benefit from equitable tolling, which would render his habeas petition timely filed.

This matter is before the Magistrate Judge on the petition, respondent's motion to dismiss, petitioner's memorandum *contra* and the exhibits of the parties. For all of the following reasons, this Court agrees that petitioner's claims were not timely filed.

I. Procedural History and Facts.

The facts of this case were set forth by the state court of appeals as follows:

> On December 1, 1995, appellant Dennis Colwell pled guilty to two counts of gross sexual imposition in violation of R.C. 2907.05; two counts of rape in violation of R.C. 2907.02; and one count of attempted rape in violation of R.C. 2923.02. Via judgment entries filed that same day, the trial court accepted appellants's pleas and sentenced him to definite terms of one year on each gross sexual imposition offense; indefinite terms of five to twenty-five years on each rape offense and an indefinite term of three to fifteen years on the attempted rape offense. Said sentences were ordered to be served consecutively.

State v. Colwell, No. 96CA114, 1997 WL 219120 (Ohio App. 5th Dist. March 27, 1997). No direct appeal followed.

On April 4, 1996, petitioner filed a Motion to Vacate Pleas on the grounds he was on medication when he entered his guilty pleas and, therefore, his pleas were not made knowingly, intelligently and voluntarily. *Id.* The motion was denied via judgment entry dated April 18, 1996. *Id.* Petitioner timely appealed this entry and, on December 6, 1996, the court of appeals affirmed the decision of the trial court. *State v. Colwell,* No. 96CA65, 1996 WL 753167 (Ohio App. 5th

Dist. December 9, 1996). No appeal to the Ohio Supreme Court followed.

Meanwhile, on June 28, 1996, petitioner filed a petition seeking post-conviction relief on the grounds of ineffective assistance of trial counsel. On August 13, 1996, the trial court denied the petition without an evidentiary hearing. Petitioner appealed this decision raising the following assignment of error:

> The trial court erred by failing to grant appellant a hearing on his petition for post-conviction relief when the evidence submitted in support of the petition raises an issue of ineffective assistance of trial counsel and that as a result of the ineffectiveness, and as a result of appellant being under the influence of prescription medication, appellant did not knowingly, voluntarily and intelligently enter his guilty pleas.

State v. Colwell, No. 96CA114, 1997 WL 219120 (Ohio App. 5th Dist. March 27, 1997). On March 27, 1997, the appellate court overruled petitioner's assignment of error. Petitioner appealed this decision to the Supreme Court of Ohio, which declined jurisdiction on July 31, 1997. *State v. Colwell,* 79 Ohio St. 3d 1460 (1997).

On December 29, 2000, the instant petition was filed asserting two grounds for relief:

> (1) The state denied petitioner's request to withdraw his guilty plea in light of evidence that his plea was not knowingly, intelligently, or voluntarily made, in violation of petitioner's due process rights under the Fifth and Fourteenth Amendments to the U.S. Constitution. Said rights were further violated by the

> fact that petitioner was denied an evidentiary hearing on his motion for post-conviction relief to develop the record regarding his blindness, use of narcotic pain medicine, and ineffective assistance of counsel during the relevant time periods. An evidentiary hearing is requested to develop the record on this ground for relief.
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> (2) Petitioner was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel, as trial counsel failed to advise him of his right to remain silent and investigate the allegations against petitioner, before allowing him to be interrogated by the police and plead guilty [to the] criminal charges. Petitioner was also denied the effective assistance of counsel, as trial counsel failed to inform petitioner of his defenses to the charges of rape and attempted rape and the potential penalties involved in a guilty plea to rape, attempted rape and gross sexual imposition. Petitioner was further denied the effective assistance of counsel prior to and on the day of the guilty plea and sentencing.

See Petition.

II. Statute of Limitations and Equitable Tolling.

Initially, respondent argues that the petition should be dismissed as barred by the statute of limitations. Petitioner's habeas petition was filed after the Antiterrorism and Effective Death Penalty Act (AEDPA) became effective on April 24, 1996, and the provisions of that Act apply to this case. *See Isham v. Randle,* 226 F.3d 691 (6th Cir. 2000), *cert. denied,* 121 S.Ct. 1211 (2001). The AEDPA states that a "one-year period of limitations shall apply to an application for a writ of

habeas corpus by a person in custody pursuant to the judgment of a state court." 28 U.S.C. § 2244(d) (1). The statute of limitations begins to run on the latest of four circumstances, one of which is the "date on which the judgment became final by conclusion of direct review or the expiration of time for seeking such review." 28 U.S.C. § 2244(d) (1) (A). The one-year period of limitations is tolled, however, for that amount of time in which "a properly-filed application for state post-conviction or other collateral review with respect to the pertinent judgment or claim is pending."[1]

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[1] 128 U.S.C. 2244 provides in relevant part:

(d) (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered

28 U.S.C. § 2244(d) (2) .

Petitioner was sentenced on December 1, 1995. He did not seek direct review of his conviction. As a result, petitioner's conviction became final prior to the effective date of the AEDPA. A petitioner whose conviction became final prior to the April 24, 1996, effective date of the AEDPA, has one year from that date, or until April 24, 1997, in which to initiate a habeas action. *Isham v. Randle,* 226 F.3d 691 (6th Cir. 2000), *cert. denied,* 121 S.Ct. 1211 (2001). The petition was actually filed on December 29, 2000.

Petitioner has clearly filed his petition beyond the period of time provided by the statute of limitations. However, in petitioner's memorandum *contra* respondent's motion to dismiss, petitioner claims the benefit of the doctrine of equitable tolling:

> (1) Petitioner's former lawyer, hired to file, *inter alia*, a federal habeas corpus action, miscalculated the AEDPA deadline and informed Mr. Colwell that the statute had passed;
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> (2) Petitioner's blindness prevented him from accessing the prison's law library and necessary forms

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> through the exercise of due diligence.
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> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Id.

to file a § 2254 petition; and

(3) The evidence shows a manifest miscarriage of justice, through ineffective assistance of counsel, which resulted in the conviction of an innocent man on the charges of rape and attempted rape.

See Petitioner's Memorandum *contra* Respondent's Motion to Dismiss.

The Sixth Circuit has ruled that equitable tolling is available in a habeas action, and has adopted the five prong test set out in *Andrews v. Orr,* 851 F.2d 146 (6th Cir. 1988), to determine when equitable tolling is appropriate. *Dunlap v. United States,* 250 F.3d 1001, 1008 (6th Cir. 2001). To determine whether equitable tolling of a limitations period is appropriate, the Court must consider the following factors: (1) lack of actual notice of filing requirement; (2) lack of constructive knowledge of filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the defendant; and (5) a plaintiff's reasonableness in remaining ignorant of the filing requirement. *Andrews,* 851 F.2d at 150. Having considered those factors, this Court concludes that petitioner is not entitled to the benefits of the doctrine of equitable tolling.

Petitioner first argues that a mistake on the part of his former attorney entitles him to equitable tolling. In *Harris v. Hutchinson,* 209 F.3d 325 (4th Cir. 2000), Harris, the petitioner in a habeas action, argued that equitable tolling should be applied in his case because he relied on the "negligent and erroneous advice" of his counsel who "misadvised" him of the deadline for filing his habeas petition and because precedent at the time counsel gave him the advice was not "clear." Counsel for Harris conceded that he

provided incorrect advice, citing a lack of clarity in existing precedent at the time. In rejecting Harris's argument, the court stated, "[A] mistake by a party's counsel in interpreting a statute of limitations does not present the extraordinary circumstance beyond the party's control where equity should step in to give the party the benefit of his erroneous understanding." *Id.* at 331. *See also Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999) [holding that a lawyer's miscalculation of a limitations period is not a valid basis for equitable tolling]; *Sandvik v. United States,* 177 F.3d 1269, 1272 (11th Cir. 1999) [refusing to toll the limitations period where the prisoner's delay was assertedly the result of a lawyer's decision to mail the petition by ordinary mail rather than to use some form of expedited delivery]. *See also Gilbert v. Secretary of Health and Human Services,* 51 F.3d 254, 257 (Fed. Cir. 1995) [holding that a lawyer's mistake is not a valid basis for equitable tolling]. Accordingly, any mistake on the part of petitioner's former attorney does not entitle him to invoke the benefit of equitable tolling.

Petitioner next asserts that he is legally blind and argues that he could therefore not access the prison's library in order to timely file his habeas petition. The federal courts resort to equitable tolling only sparingly. *See Irwin v. Dept. of Veterans Affairs,* 498 U.S. 89, 95-96 (1990); *Wilson v. Grumman Ohio Corp.*, 815 F.2d 26, 28-29 (6th Cir. 1987). Equitable tolling generally will not excuse the failure to comply with procedural time requirements where the complainant does not diligently pursue his remedies. *Irwin,* 498 U.S. at 96.

Some courts have recognized the possibility that a physical or mental disability might support equitable tolling. *See e.g. Hood v. Sears, Roebuck & Co.,* 168 F.3d 213, 232-33 (5th Cir. 1999). However, petitioner offers this Court no evidence

of how his blindness prevented him from timely filing his habeas petition. Petitioner offers no evidence of any effort on his part to show that he diligently pursued his habeas application and still could not file it in a timely manner. Nor does petitioner explain the more than two year delay between the time he allegedly received erroneous advice from prior counsel, concerning the filing of a habeas action, until the actual filing of the petition. Accordingly, this Court cannot say that petitioner has diligently pursued his rights or that petitioner lacked knowledge of the filing requirements sufficient to warrant equitable tolling.

Finally, petitioner argues that the statute should be equitably tolled because he is the victim of "a fundamental miscarriage of justice, involving actual innocence, . . . due to ineffective assistance of counsel." *See* Petitioner's Memorandum *contra* Respondent's Motion to Dismiss. Petitioner argues that when a petitioner has defaulted his state remedies and has not demonstrated cause and prejudice, a federal court may nonetheless entertain the habeas petition if the petitioner can demonstrate that constitutional error probably resulted in the conviction of an actually innocent person. *See Murray v. Carrier,* 477 U.S. 478, 496 (1986); *Rust v. Zent,* 17 F.3d 155, 162 (6th Cir. 1994). Accordingly, petitioner proposes an actual innocence exception to the statute of limitations.

Petitioner's proposal is misplaced. First, petitioner has not even separately alleged in the petition that he is actually innocent.[2] Petitioner had not presented a claim of innocence in his prior appeals in state court. Additionally, petitioner has

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[2] Petitioner's claim of innocence is contained within his ineffective assistance of counsel claim.

not sought to introduce any new evidence of his innocence, nor has he alleged that any such evidence exists. Petitioner states only that, "if given the opportunity, petitioner will show that his counsel was prejudicially ineffective." *See* Petitioner's Memorandum *contra* Respondent's Motion to Dismiss. Petitioner has not offered this Court any new evidence that would demonstrate petitioner's innocence; as a result, petitioner has not made any meaningful showing of actual innocence and is not entitled to equitable tolling on that basis.

III. Conclusion.

Petitioner is not entitled to equitable tolling, and as a result his petition was untimely filed. Because the petition is barred by the statute of limitations, this Court need not address respondent's arguments that petitioner has failed to exhaust his state court remedies.

IV. Recommendation.

For all of the foregoing reasons, the Court **RECOMMENDS** that respondent's motion to dismiss be **GRANTED**, and that the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 be **DISMISSED** as untimely.

If any party seeks review by the District Judge of this *Report and Recommendation,* that party may, within ten (10) days, file and serve on all parties objections to the *Report and Recommendation,* specifically designating this *Report and Recommendation,* and the part thereof in question, as well as the basis for objection thereto. 28 U.S.C. § 636(b) (1).

The parties are specifically advised that failure to object to the *Report and Recommendation* will result in a waiver of the right to *de novo* review by the District Judge and of the

right to appeal the decision of the District Court adopting the *Report and Recommendation*. *See Thomas v. Arn*, 474 U.S. 140 (1985); *Smith v. Detroit Federation of Teaches, Local 231 etc.*, 829 F.2d 1370 (6th Cir. 1987); *United States v.* Walters, 638 F.2d 947 (6th Cir. 1981).

/s/_____
Norah McCann King
United States Magistrate Judge